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10/550,936	09/28/2005	Frans Johan Sarnecki	19790-003US1	4644
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EXAMINER WATTS, JENNA A				
ART UNIT		PAPER NUMBER		
1794				
NOTIFICATION DATE		DELIVERY MODE		
09/01/2009		ELECTRONIC		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

PATDOCTC@fr.com

### Office Action Summary

**Application No.**

10/550,936

**Applicant(s)**

SARNEEL ET AL.

**Examiner**

JENNA A. WATTS

**Art Unit**

1794

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-13 and 16-20 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-13 and 16-20 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 28 September 2005 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-8508)
- 4) ☐ Interview Summary (PTO-413)
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_
- Paper No(s)/Mail Date \_\_\_\_

## DETAILED ACTION

### *Claim Rejections - 35 USC § 103*

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

3. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

**4. Claims 1-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Fazzina et al. (U.S. Patent No. 3,852,501) in view of Suderman (U.S. Patent No. 4,588,600), further in view of Evans et al. (U.S. Patent No. 4,208,442), and in light of Kettlitz (U.S. Patent No. 6,235,894).**

5. Regarding Claims 1, 7, 8 and 20, Fazzina teaches a dry mix (Column 1, lines 61-63) which provides an edible food coating that will form a continuous, crisp, fat fried-like coating when applied to a wide variety of foodstuffs (Column 1, lines 40-43 and Column 3, lines 15-17). Since the mix can be applied to a variety of foodstuffs, it is deemed a multipurpose mix. Fazzina teaches that the mix is applied or spread onto foods such as meat and subsequently baked (Column 1, lines 9-10 and line 63), thus the mix is also deemed a spread in baked savory products.

6. Fazzina further teaches that the dry mix comprises corn starch hydrolyzate in an amount of 15-35% (Column 2, lines 13-15 and 36-37), farinaceous material, which is usually a flour such as wheat, corn, etc. in an amount of 8-35% (Column 2, lines 22-23 and 37-38), modified starch, which can be partially gelatinized, in an amount of 5-18%, and shortening/fat in an amount of 10-50% (Column 2, lines 60-61 and Column 3, lines 1-2), all by weight of the final dry coating mixture. The above ingredients are deemed to meet the limitations of Claims 7, 8 and 20 because they include all or part of the range claimed by Applicant.

7. Since Fazzina teaches that wheat flour can be present, it would be expected that some amount of gluten would be present in the dry mix, however, Fazzina does not specifically teach gluten present in an amount of 10-20% by weight.
8. Suderman teaches a dry edible food composition for use in imparting a baked, coated comestible the taste, texture and appearance of a fried coated comestible (Column 3, lines 58-60), which comprises a blend of flours including corn flour (Column 4, lines 40-43) and a heat coaguable protein film former such as vital wheat gluten (Column 4, lines 45-46), employed in an amount of about 0-20%, based on the weight of the dry mix (Column 6, lines 14-15). Suderman teaches that the vital wheat gluten is the principle structure-building ingredient of the present invention (Column 6, lines 13-14) and further teaches that it is the intention in the present invention to use the flours more as bulking agents, and to rely on controlled amount of structure-building proteins such as vital wheat gluten, to obtain an engineered structure (Column 5, lines 30-34). Suderman further teaches that the vital wheat gluten in the mix contributes to producing a coating that forms a substantially continuous film or envelope expanded in some irregular manner, which further closely simulates the appearance of a fried product (Column 4, lines 60-65 and 18-20).
9. Therefore, it would have been obvious to one of ordinary skill in the art at the time of the invention, for the dry mix of Fazzina to further include vital wheat gluten in range of 0-20%, as taught by Suderman, because Suderman teaches that the combination of flour and vital wheat gluten in the dry mix contribute to produce a coating that forms a substantially continuous film or envelope that closely resembles a fried food

product. One of ordinary skill in the art would have been motivated to add gluten in an amount of 10-20% or 12-25% by weight to the dry mix in order to produce a food product with a continuous outer coating and the taste, texture and appearance of a fried-food product.

10. Fazzino teaches the use of a modified starch that can be partially gelatinized (Column 2, lines 50-51), but does not specifically teach the use of starch n-octenyl succinate.

11. Evans teaches a dry coating composition that is used to produce a baked coated comestible with a coating having a crisp texture and taste, a uniform coloration and appearance and good adhesion to the comestible surface as well as the taste, texture and appearance of a fried coated comestible (Column 1, lines 34-39 and 45-46). Evans further teaches adding a binding agent to the dry coating (Column 13-14) that is a starch modified using 1-octenyl succinic anhydride, and further teaches that this modified starch provides optimum emulsive and film-forming properties which are suitable in the instant invention (Column 3, lines 30-34). Starch 1-octenyl succinic anhydride is deemed synonymous with n-octenyl succinate in light of the evidentiary reference that teaches that n-octenyl succinic anhydride is also called n-OSA and equates it with n-octenyl succinated starches (see evidentiary reference Kettlitz, Column 2, lines 57-58 and Column 4, line 20) and Applicant refers to n-octenyl succinate as n-OSA (See instant application, Page 9, lines 10). Furthermore 1-OSA is deemed chemically synonymous with n-OSA.

12. Therefore, it would have been obvious to one of ordinary skill in the art at the time of the invention for the dry mix of Fazzina in view of Suderman to have used n-octenyl succinate as the modified starch, as taught by Evans, because Evans teaches that n-octenyl succinate provides optimum emulsive and film-forming properties which are suitable to produce a food product with an outer coating that has good adhesion to the food product and resembles a fried food product. One of ordinary skill in the art would have been motivated to such n-octenyl succinate in order to ensure that the coating was uniform and adhered to the food product, thereby creating a food product that is desirable to consumers.

13. Therefore, regarding the limitations of Claim 1, since Fazzina in view of Suderman and Evans teach the dry mix compositions of Claims 7 and 8, it would be expected that such a dry mix would have a freeze-thaw stability of at least 98%, a baking stability of 100% and a stable viscosity under alkaline, acidic and neutral pH conditions, absent any evidence to the contrary.

14. Regarding Claims 2, 3 and 19, Fazzina in view of Suderman and Evans teach a dry mix that comprises 10-50% weight % fat (see Fazzina Column 2, lines 60-61 and Column 3, lines 1-2), thus a fat % of 15-28 is also encompassed by Fazzina. Fazzina in view of Suderman and Evans further teach proteins in the range of 0-20 weight % of vital wheat gluten (see Suderman, Column 4, lines 45-46 and Column 6, lines 14-15), thus a protein % of 10-20 is also encompassed by Suderman. Fazzina in view of

Suderman and Evans also teach carbohydrates in the range of 15-35% of corn starch hydrolyzate (See Fazzina, Column 2, lines 13-15 and 36-37). The dry mix can also be seen as a spread in baked savory products because Fazzina in view of Suderman and Evan teach that the mix is applied or spread onto foods such as meat and subsequently baked (see Fazzina, Column 1, lines 9-10 and line 63).

15. Fazzina in view of Suderman and Evans do not specifically teach carbohydrates in the range of 25-65% by weight.

16. However, it would have been obvious to one of ordinary skill in the art at the time of the invention for the range of carbohydrates as taught by Fazzina in view of Suderman and Evans to be in the range of 25-65% because Fazzina in view of Suderman and Evans teach carbohydrates present in the range of 15-35%, thus it would be feasible that carbohydrates could be in the range of 25-35% by weight of the dry mix, which would fall in the claimed range.

17. Regarding Claim 4, Fazzina in view of Suderman and Evans are taken as cited above and teach that the proteins are vital wheat gluten (see Suderman, Column 4, lines 45-46 and Column 6, lines 14-15).

18. Regarding Claims 5 and 6, Fazzina in view of Suderman and Evans are taken as cited above in the rejection of Claim 1 and teach that the emulsifying starch is starch n-octenyl succinate (see Evans, Column 3, lines 30-34).



19. Regarding Claims 9 and 13, Fazzina in view Suderman and Evans teach a completed mix, wherein the dry mix is combined with water and liquid oil to form a batter and such a combination may result in a liquid oil/water matrix in which the dry particles are fairly uniformly dispersed (See Suderman, Column 4, lines 8-10). Fazzina in view of Suderman and Evans further teach that normally this would be likely to result, on baking, in a uniform appearance and structure (See Suderman, Column 4, lines 10-11). Furthermore, since Fazzina in view of Suderman and Evans teach a completed mix, such a completed mix is deemed a spread because the completed mix or batter is spread or applied onto a food product prior to baking (see Suderman, Column 3, lines 44-45).

20. Regarding Claim 10, Fazzina in view of Suderman and Evans are taken as cited above for the rejection of Claim 1 and teach a food composition comprising meat (See Fazzina, Column 1, lines 61-63) and the dry mix of Claim 1.

21. Regarding Claims 11 and 12, Fazzina in view of Suderman and Evans are taken as cited above and teach a savory filled product, wherein the filling is meat (see Fazzina, Column 61-64), and further teach the completed mix or batter of Claim 9 (see Suderman, Column 4, lines 8-10). Fazzina in view of Suderman and Evans further teach that it is known to coat various comestibles, such as meat, with a combination of batter and breading mixes wherein the breading is relied upon to give a crispness and

appearance somewhat characteristic of a fried or deep-fat fried comestible (see Suderman, Column 1, line 31 and 37-39). Therefore, the layer of breadding is on and/or around the completed mix, the breadding deemed synonymous with bread or bread crumbs.

22. Regarding Claims 16 and 17, Fazzina in view of Suderman and Evans are taken as cited above for the rejection of Claim 1. Since Fazzina in view of Suderman and Evans teach the dry mix compositions of Claims 7 and 8, it would be expected that such a dry mix would have a freeze-thaw stability of at least 99.0%, absent any evidence to the contrary.

**23. Claim 18 is rejected under 35 U.S.C. 103(a) as being unpatentable over Fazzina et al. (U.S. Patent No. 3,852,501) in view of Suderman (U.S. Patent No. 4,588,600) and Evans et al. (U.S. Patent No. 4,208,442), and in further view of Kettlitz et al. (U.S. Patent No. 6,235,894).**

24. Fazzina in view of Suderman and Evans are relied upon as above for the rejection of Claim 6.

25. Fazzina in view of Suderman and Evans are taken as cited above but do not specifically teach the use of stabilized starch n-octenyl succinate.

26. Kettlitz teaches the preparation of a heat stable high viscosity starch obtained by reacting starch or chemically modified starches with activated chlorine under alkaline conditions (Column 2, lines 48-50) and further teaches that high viscosity starches have

a tendency to burst during heating which leads to a drastic viscosity breakdown and in order to overcome such undesirable viscosity breakdown, starches may be stabilized (Column 1, lines 25-28). Kettlitz further teaches that the high viscosity stabilized starches are particularly suitable in many different preparations, for example, in the preparation of meat products and convenience foods that need to have a high viscosity and smooth texture after heating (Column 1, lines 47-49 and 51-52).

27. Therefore, it would have been obvious to one of ordinary skill in the art for the starch n-octenyl succinate as taught by Fazzina in view of Suderman and Evans to have been stabilized starch n-octenyl succinate because Kettlitz teaches that such stabilized starches are particularly suitable for the preparation of meat products and convenience foods where a high viscosity and smooth texture after heating are desirable. One of ordinary skill in the art would have been motivated to use a stabilized starch in the preparation of baked and breaded meat products in order to ensure that the resulting breading/coating has a smooth and uniform texture and that the starch remains stable and viscous during heating to allow it to act as a binding agent in the coating.

***Examiner's Comment***

28. It is noted that the amended range of 10-25 w/w% gluten stated in Claim 7 finds support in original Claims 7 and 8.

***Response to Arguments***

29. The objections and 112 2nd rejections set forth in the office action mailed on 3/5/2009 have been withdrawn due to applicant's amendments filed 6/3/2009.

30. Applicant's arguments filed 6/3/2009 have been fully considered but they are not persuasive.

31. In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). In the instant case, clear motivation was provided for the addition of the components vital wheat gluten and starch n-octenyl succinate which were not disclosed in the primary reference.

32. In response to applicant's argument that the dry mix of Fazzina in view of Suderman and Evans was a coating and not a spread or filling, first of all, a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. In the instant case, since Fazzina in view of Suderman and Evans teach the claimed components that make up the multipurpose dry

mix in the claimed ratios, the fact that one mix is called a coating and Applicant refers to the mix as a spread or filling would not give a patentable distinction. Second of all, Fazzina teaches that the dry mix can be applied or "spread" onto meat, thereby providing a teaching of the dry mix being used as a spread.

33. It is also noted that since Fazzina in view of Suderman and Evans teach the claimed composition of the dry mix, comprising the same components, the composition will react or co-act in the same manner as claimed by Applicant, and therefore, the properties and thus, the uses of these components will inherently be present. Furthermore, it is noted that the component and its properties are inseparable. Therefore, if the components are present, their properties would also be necessarily present.

### ***Conclusion***

34. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

35. A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of

the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

36. Any inquiry concerning this communication or earlier communications from the examiner should be directed to JENNA A. WATTS whose telephone number is (571) 270-7368. The examiner can normally be reached on Monday-Friday 8am-4:30pm.

37. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

38. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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Primary Examiner, Art Unit 1794

/JENNA A. WATTS/  
Examiner, Art Unit 1794  
August 27, 2009